

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of DYLAN JACOB FERRELL and  
DEVON LESTER FERRELL, Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

AZURE SMITH,

Respondent-Appellant,

and

AARON FERRELL,

Respondent.

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UNPUBLISHED

November 21, 2006

No. 269278

Genesee Circuit Court

Family Division

LC No. 01-113977-NA

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g), and (j). Because the statutory grounds for termination of respondent's parental rights were established by clear and convincing evidence and respondent received effective assistance of counsel in this matter, we affirm.

This case was originally opened in 2001 due to medical evidence that minor child Dylan Ferrell suffered battered child syndrome. Specifically, Dylan suffered a broken arm at just a few months old while he was in the care of his father, Aaron Ferrell, and the arm was re-injured a few weeks later while Dylan was again in the care of Aaron Ferrell. After Aaron Ferrell and respondent complied with a parent-agency agreement, the case was dismissed.

In 2003, both children were placed in the care of the Department of Human Services as a result of an incident where Dylan fell from a third-story balcony while in the care of Aaron Ferrell. Nearly a month after the fall, Dylan was observed with two black eyes and other bruising and, although Aaron Ferrell and respondent were asked to take Dylan to the hospital, they refused. Both parents signed parent-agency agreements and several review hearings were

conducted throughout 2003, 2004, and 2005 to determine whether the parents were in substantial compliance with the agreements. During the hearings, information was provided indicating that Aaron Ferrell had a substance abuse problem, engaged in angry confrontations (sometimes physical) with Department of Human Services workers and others, and was arrested for domestic violence involving appellant. Despite these issues and the existence of a no-contact order, respondent continued her relationship with Aaron Ferrell, at times residing with him. A petition for termination of their parental rights was thereafter filed and, at the conclusion of a trial in this matter, the trial court terminated Aaron Ferrell and respondent's parental rights.

On appeal, respondent<sup>1</sup> first contends that the trial court erred in finding that the statutory grounds for termination of her parental rights were established by clear and convincing evidence. We disagree.

We review a trial court's findings in a termination proceeding for clear error. MCR 3.977(J). *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). "A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller, supra* at page 337.

Pursuant to MCL 712A.19b(3), the court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, any of several occurrences, including:

\* \* \*

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

\* \* \*

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

\* \* \*

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

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<sup>1</sup> For ease of reference, "respondent" will refer to respondent-appellant Azure Smith, as respondent Aaron Ferrell is not a party to this appeal.

In the instant matter, it is undisputed that 182 or more days have elapsed since the issuance of an initial dispositional order. Moreover, the primary condition preventing the children's return to respondent's care during this child protective proceeding was her continued association with their father, Aaron Ferrell, and failure to protect the children from his inappropriate care. The same condition existed during a prior child protective proceeding conducted from May 2001 to January 2003.

Respondent continually denied that Ferrell had violent propensities, despite evidence of his aggressive confrontations with herself and several others. Respondent did not make a concerted effort to cease all contact with Ferrell despite court orders to do so, and, given her failure for several years to completely separate from him, there was no reasonable expectation that she would do so within a reasonable time. The evidence was clear and convincing that respondent did not recognize the danger Ferrell posed to the children and would allow Ferrell contact with the children if they were returned to her. The children had previously suffered physical harm in Ferrell's care and would likely suffer physical harm again if returned to respondent.

Respondent next argues that the trial court's failure to make a "best interests" finding constituted reversible error. While it is best for a trial court to make a finding that there was insufficient evidence that termination was clearly not in a child's best interests, a specific best interests finding is not required if no party offers such evidence. *In re Gazella*, 264 Mich App 668, 678; 692 NW2d 708 (2005). If the court makes no finding regarding best interests, then the court has not found that termination would clearly not be in the child's best interests. *Id.*

Here, no best interests evidence was presented that would require the trial court to address the issue. The lower court record showed that petitioner proposed admission of respondent's handwritten statement regarding an incident of domestic violence as best interests evidence, but the trial court did not admit that evidence and petitioner withdrew its request for admission after cross-examining respondent. Therefore, no party offered best interests evidence and a specific best interests finding was not required.

Lastly, respondent argues that she was denied effective assistance of counsel because her substitute counsel was appointed one day before the termination hearing. If, as here, a claim of ineffective assistance of counsel is not preceded by an evidentiary hearing or a motion for new trial before the trial court, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the

defendant must show that counsel's performance was so deficient that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra* at 599-600.

A complete review of the two-day termination hearing showed that counsel for respondent was aware of the issues, was familiar with the law applicable to termination hearings, made appropriate objections, thoroughly and effectively cross-examined opposing witnesses, and elicited appropriate evidence from respondent. Absent identification on appeal of additional witnesses counsel should have called, the substance of their testimonies, or how the outcome of the hearing would have been impacted by the same, it cannot be said that counsel was ineffective in failing to call additional witnesses. There was no indication on the record that substitution of counsel, even so close to the hearing date, had a prejudicial impact on the outcome of the hearing. Respondent received a fair hearing, and her substantial rights were not affected.

Affirmed.

/s/ Deborah A. Servitto  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot